Litigation Section of The State Bar of Califonia

# Litigation Update

Litigation Section News

August 2007

**No fees to successful defendant in elder abuse case.** *Welf. & Inst. Code* §15657.5(a) provides that a plaintiff who prevails in an action for financial elder abuse is entitled to attorney fees. But this fee shifting provision is unilateral. A defendant who prevails in such an action is not entitled to fees. *Wood v. Santa Monica Escrow Co.* (Cal. App. Second Dist., Div. 6; June 7, 2007) 151 Cal.App.4th 1186, [60 Cal.Rptr.3d 597, 2007 DJDAR 8421].

**Retroactive judgment saves damages for pain and suffering and future loss.** *Code Civ. Proc.* §377.34 prohibits recovery of damages for pain and suffering and future economic loss if plaintiff dies before judgment is entered. In *Cadlo v. Metalclad Insulation Corp.* (Cal. App. First Dist., Div. 5; June 11, 2007) 151 Cal.App.4th 1311, [61 Cal.Rptr.3d 104, 2007 DJDAR 8602], plaintiff died after the verdict had been signed, but, before it was entered as a judgment. The trial court entered the judgment, including these damages, nunc pro tunc to the day before plaintiff's death and the Court of Appeal affirmed the judgment. The court noted that the action prevented defendant from receiving a windfall and justice was better served by permitting plaintiff's widow to benefit from the verdict.

**No recovery of punitive damages in attorney malpractice.** In *Ferguson v Lieff, Cabraser, Heimann & Bernstein* (2003) 30 Cal.4th 1037, [69 P.3d 965; 135 Cal.Rptr.2d 46], our Supreme Court held that lost punitive damages in an underlying action cannot be recovered as compensatory damages in an attorney malpractice case. In *Expansion Pointe Properties v. Procopio, Cory, Hargreaves & Savitch LLP* (Cal. App. Fourth Dist., Div. 1; June 15, 2007) 153 Cal.App.4th 51, [61 Cal.Rptr.3d 166], the court rejected plaintiffs' argument that the *Ferguson* rule should not be applied because they relied on their ability to sue their lawyers for lost punitive damages when they signed the retainer agreement before the latter case came down. Clever argument but the court did not bite.

**Mark Twain as precedent.** Quoting Mark Twain's "whiskey is for drinking, water is for fighting," the Court of Appeal affirmed the dismissal of a suit involving the transfer of water rights from Imperial to San Diego county. *County of Imperial v. Sup.Ct.* (State Water Resources Control Board (Cal. App. Third Dist.; June 14, 2007) (*As Mod.* June 15, 2007 in 152 Cal.App.4th 152), 152 Cal.App.4th 13, [61 Cal.Rptr.3d 145, 2007 DJDAR 8843].

**Mediation privilege bars evidence of settlement offer.** In a legal malpractice case plaintiff claimed that, during mediation, the defendants had submitted an unauthorized settlement offer on his behalf. He learned this from the mediation brief submitted by the defendants and e-mails quoting from that brief. Relying on the mediation privilege (*Evid. Code* §§ 1115 ff.), defendants sought a protective order precluding the use of this document. The trial court denied the motion. But the Court of Appeal reversed, holding that the statute protected the confidentiality of these documents even if this meant that plaintiff would be unable to prove his case. *Wimsatt v. Sup.Ct. (Kausch)* (Cal. App. Second Dist., Div 3; June 18, 2007) 152 Cal.App.4th 137, [61 Cal.Rptr.3d 200, 2007 DJDAR 8961].

**Even if contract is unenforceable, lawyer may be compensated under quantum meruit.** Where a lawyer entered into a non-enforceable fee sharing agreement, he was nevertheless entitled to be compensated for services rendered under a theory of quantum meruit. Even though the contract was unenforceable, the subject services were not themselves prohibited or illegal. *Hyon v. Seltin* (Cal. App. Second Dist., Div 1; June 22, 2007) 152 Cal.App.4th 463, [60 Cal.Rptr.3d 896, 2007 DJDAR 9414].

**Social workers immune for filing petitions to the court.** When Coby, born prematurely, sustained dangerous weight losses, social case workers, contending his condition was due to mother's conduct resulting from Munchausen Syndrome by Proxy, filed a dependency petition seeking to have Coby made subject to the jurisdiction of the juvenile court.

The dependency petition was denied and the parents sued the social workers in federal court under 42 U.S.C. §1983. The district judge dismissed the petition and the Ninth Circuit affirmed, holding that the social workers were entitled to absolute immunity for their actions. *Beltran v. Santa Clara County* (9th Cir.; June 25, 2007) [2007 DJDAR 9618].

**Clause mandating another forum does not deprive California court of jurisdiction.** In *Miller-Leigh LLC v. Henson* (Cal. App. Third Dist.; June 28, 2007) 152 Cal.App.4th 1143, the contract

**Create Your Member Profile On-line**

Watch for your access code in your mail, or obtain it from your State Bar dues statement. Then go on-line to create your profile and customize your interests. www.calbar.org

between the parties designated Arizona as the forum for any litigation between the parties. Plaintiff sued in Sacramento Superior Court and that court sustained defendant's demurrer without leave to amend, holding it lacked jurisdiction to hear the case.

The Court of Appeal reversed. A forum selection clause does not deprive another forum of jurisdiction. The trial court had discretion to enforce the forum selection clause but failed to exercise its discretion when it ruled that it lacked subject matter jurisdiction to hear the case.

Party who litigates issue in arbitration waives claim that arbitrator exceeded authority in deciding the issue. A contractual arbitration clause purported to limit the authority of the arbitrator to "modify" or "alter" the terms of the contract. After the arbitrator ruled that a warranty disclaimer in the contract was unconscionable, refused to enforce it, and awarded damages against a supplier accordingly, the supplier sought to have the award vacated on grounds that the arbitrator exceeded his authority. The trial court confirmed the award and the Court of Appeal affirmed in *J. C. Gury Co. v. Nippon Carbide Industries (USA), Inc.* (Cal. App. Second Dist., Div. 8; June 29, 2007) 152 Cal.App.4th 1300, [2007 DJDAR 9932]. The supplier submitted the issue of unconscionability to the arbitrator and cannot now claim the arbitrator exceeded his authority by considering the issue.

**Arbitrators exceed their authority by rewriting contract approved by legislature.** An employment contract with the California Correctional Peace Officers Association was approved by the legislature. In a subsequent dispute, an arbitrator ruled that, due to a mutual mistake, a portion of the contract could not be enforced. The Court of Appeal agreed with the trial court that the arbitration award should not be confirmed. Where an arbitration award violates a statutory right or public policy, it cannot be confirmed. *Dept. of Personnel Administration v. California Correctional Peace Officers Association* (Cal. App. Third Dist.; June 29, 2007) 152 Cal.App.4th 1193, [2007 DJDAR 9959].

**Lien holder's sale of account receivable at a discount does not reduce amount owed by plaintiff.** Suppliers of medical services held a lien against plaintiff's recovery in a personal injury suit. They later sold their claim at a discount. This did not decrease the amount of the lien for which plaintiff was liable. *Katiuzhinsky v. Perry* (Cal. App. Third Dist.; June 29, 2007) 152 Cal.App.4th 1288, [2007 DJDAR 9955].

**Soldier may sue under Federal Tort Claims Act where accident unrelated to military service.** While corporal Schoenfeld was on "liberty," he was injured as a passenger in a car which crashed into a defective guardrail on a military base. Under *Feres v. United States* (1950) 340 U.S. 135, the federal government is immune from suit for injuries incident to military service. The Ninth Circuit held that, since plaintiff's activities did not implicate military discipline, the Feres doctrine did not preclude his suit under the Federal Tort Claims Act. *Schoenfeld v. Quamme* (9th Cir.; July 2, 2007) (Case No. 05-55126) [2007 DJDAR 10068].

**Parentage by estoppel did not apply where husband did not know child was not his.** Under the doctrine of parentage by estoppel, *Clevenger v. Clevenger* (1961) 189 Cal.App.2d 658, held that a husband has a duty to support his wife's illegitimate child when he accepts the child into his family and treats the child as legitimate. But the doctrine does not apply where the husband did not know he was not the child's biological father. *County of San Diego v. Arzaga* (Cal. App. Fourth Dist., Div. 1; July 2, 2007) 152 Cal.App.4th 1336, [2007 DJDAR 10103].